rule of universal law. Brian's *dictum*, that the wrongful possessor had the property and the dispossessed owner only the right of property, rightly understood, is not a curiosity for the legal antiquarian, but a working principle for the determination of controversies for all time.

J. B. Ames.

CAMBRIDGE, 1890.

STATE JURISDICTION IN TIDE WATER.

THE debt which jurisprudence owes to passion is a heavy one. It is litigation which defines legal rules to greater precision; and litigation most frequently originates in feelings entirely remote from a desire to assist the growth of law as an abstract science, or complete its efficiency as a working system. Among these feelings, a desire to get gain, even at a little risk, easily takes high rank. On the surface, for example, there is little connection between an abundance of menhaden in the summer of 1889 and questions of constitutional law. Such a connection became evident, however, in July, 1889, when steam seining vessels, attracted by the presence of menhaden in unusual numbers, began catching them by purse seins and steam appliances in waters geographically known as Buzzard's Bay — a narrow sheet of tide water in southeastern Massachusetts. These steamers hailed from Rhode Island, were duly enrolled, and had taken out the "United States fishing license," so called. July 19, 1889, certain of the Massachusetts district police, with local aid, in a little New Bedford tugboat, boarded the "A. T. Serrell" and the "Seaconnet," two of these vessels then engaged in plying the fishing business at a point about a mile off Quisset Harbor, in the town of Falmouth, declared them seized, and afterwards arrested their crews as fishing in violation of chapter 192 of the Laws of 1886, "An Act for the protection of the Fisheries in Buzzard's Bay." This statute is substantially as follows: —

Section 1 provides that "No person shall draw, set, stretch or use any drag net, set net, or gill net, purse or sweep seine of any kind for taking fish anywhere in the waters of Buzzard's Bay within the jurisdiction of this Commonwealth nor in any harbor, cove or bight of said bay except as hereinafter provided." (These ex-

ceptions are set out in section 4, and are not material as to the conduct of these vessels.) Section 2 provides that "Any net or seine used in violation of any provision of this act, together with any boat, craft, or fishing apparatus employed in such illegal use, and all fish found therewith, shall be forfeited; and it shall be lawful for any inhabitant or inhabitants, of any town bordering on said bay, to seize and detain, not exceeding forty-eight hours, any net or seine found in use contrary to the provisions of this act, and any boat, craft, fishing apparatus, and fish found therewith, to the end that the same may be seized and libelled if need be by due process of law." By section 3, "All nets and seines in actual use set or stretched in the waters aforesaid in violation of this act, are declared to be common nuisances." By section 5, "Whoever violates any provision of this act or aids or assists in violating the same shall pay a fine not exceeding two hundred dollars for each offence." Except so far as modified by Stat. 1887, chap. 197, allowing the use of gill nets or set nets within one-half mile of the shores of the town of Mattapoisett (an amendment with no application to these vessels), the law was unrepealed. It may be stated here that the law of 1886 was itself a continuation and extension of similar laws existing for a period of about thirty years,[1] and was regarded as valuable to the section affected by it, and indirectly to the public generally, by protecting a natural spawning ground and breeding ground for fish in the warm, shallow waters of this indented bay, which, as a summer resort in growing favor, finds the preservation of its fisheries of very practical importance. The crews were taken under arrest to Barnstable, arraigned, released on bail, found guilty at a subsequent hearing before the local magistrate, fined $100 each and appealed to the Superior Court, then to be holden in October. A libel for forfeiture was also filed against the steamers on behalf of the State, on informatiom of the attorney general.[2]

Apparently relying upon the advice of counsel that the offence was not cognizable in the State courts (and perhaps influenced by the presence of the menhaden), the seiners returned to Buzzard's Bay, and as a consequence, on September 9, 1889, a party of State officers, under the guise of friendly fishermen ask-

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[1] 1856, ch. 576; 1870, ch. 249; 1874, ch. 282.

[2] See Hine *v.* Trevor, 4 Wall. 555; U. S. *v.* Ferry Co., 21 Fed.Rep. 331, 337; Butler *v.* Boston Steamship Co., 130 U. S. 527, 558.

ing for bait, boarded the "Joseph Church," owned in Tiverton, R. I., swarmed out of the cramped cabin of a "cat boat," and again proceeded to seize and arrest. The "Joseph Church," was then actively engaged in drawing a purse seine containing about four hundred and fifty barrels of menhaden, in the waters of Buzzard's Bay, at a point about two miles off the West Falmouth shore. A struggle of considerable duration, which embraced among its incidents the free exhibition of revolvers, the cutting of the steamer's tiller lines, and placing the captain and pilot of the "Church" in irons, in an endeavor to dissuade these gentlemen from carrying the State officers into Rhode Island waters, finally resulted in the arrest of the crew, who were carried into New Bedford, taken to Barnstable, where the same proceedings were had. They also appealed. While the State officers held the "Church," they reported seeing the "Seaconnet," then bonded under her libel, take some seven hundred barrels of menhaden with a purse seine.

At the October sitting of the Superior Court for Barnstable County the defendants were found guilty, and have taken, by report, in the test case of Commonwealth *v.* Manchester, the legal questions involved to the Supreme Judicial Court, where they are ripe for argument. It is understood that it is the intention of the defendants, in case of an adverse decision by the State court, to endeavor to take these questions to the Supreme Court of the United States as "federal questions." The grounds relied on by the defendants' counsel (George A. King and James F. Jackson, Esqs.), are briefly three: —

I. The Act of 1886 did not prohibit the acts complained of.

II. The defendants were licensed by the United States Government to fish, and the United States, being of paramount authority as to fisheries, the defendant, as its licensee, could fish in State waters in spite of State laws.

III. The acts complained of were not committed within the jurisdiction of Massachusetts.

These points are apparently of importance in a reversed order; it may, however, be convenient to consider them in the order stated: —

I. *The Act of 1886 does not apply.*

The basis for this contention lies in the existence of chapter 212 of the Acts of 1865, which is as follows: —

From and after the passage of this act it shall be lawful for any person to take menhaden by the use of the purse seine, so called, in the waters of Buzzard's Bay or of Vineyard Sound, or the waters of any bays, inlets or rivers bordering on or flowing into the same: *provided*, that no authority shall be hereby given to use any such seine at the mouth of any river where there now is or where there may hereafter be a herring fishery established by law, until after the fifteenth day of June in each year; and *provided, further*, that no authority shall be hereby given to use any seine in the waters around Nantucket or the islands belonging thereto.

Upon reference to the Act of 1886 it will appear that it makes no express repeal. The question, therefore, is: Are its provisions such as to work a repeal by implication? Now it is elementary that repeal by implication is a question of legislative intention.[1] General rules are chiefly useful for getting at this intention.[2] If two statutes, for example, dealing with the same general subject-matter, are so construed that the earlier special act is not repealed by the later more general statute, under the rule "*generalia specialibus non derogant*," much relied on by the defendant, it is only because there is ground for thinking that the Legislature has so intended.[3] It is on the same principle, that if two acts can stand together, they will be so construed. The Legislature will not, in the absence of other considerations, be assumed to have repealed an existing law, except by replacing it.[4] But the reason of these rules determines their scope, and where the later statute is plainly irreconcilable with the earlier one, it can give rise only to the inference of a legislative intention to repeal it.[5] If these conditions exist, it is of no importance that the earlier law is special, and the later general.[6] This is especially true of an act

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[1] Brown *v.* Lowell, 8 Metc. 172; Lyddy *v.* Long Island City, 104 N. Y. 218; Tierney *v.* Dodge, 9 Minn. 166.

[2] Iron Co. *v.* Pierce, 4 Biss. 327.

[3] Clements *v.* Ward, L. R. 35 Ch. Div. 589; Fitzgerald *v.* Champneys, 2 J. & H. 31; Gard *v.* Commissioners of Sewers, 49 L. T. N. S. 327; Tracy *v.* Goodwin, 5 All. 409; Brown *v.* Lowell, 8 Metc. 172; Williams *v.* Pritchard, 4 T. R. 2.

[4] Cumberland *v.* Magruder, 34 Md. 381; Snell *v.* Bridgewater, etc., Mfg. Co., 24 Pick. 296; Com. *v.* Fiannelly, 15 Gray, 195; Somerville *v.* Boston, 120 Mass. 574; County of Clay *v.* Society for Savings, 104 U. S. 579, 588; Evans *v.* Phillipi, 117 Penn. St. 226.

[5] Wallace *v.* Bassett, 41 Barb. 92; Lyddy *v.* Long Island City, 104 N. Y. 218; Park Commissioners *v.* Brenock, 18 Ill. App. 559; Southwark Bk. *v.* Com. 26 Pa. St. 446.

[6] Gage *v.* Currier, 4 Pick. 399.

apparently covering the whole subject-matter of the earlier act, and intended to remedy a mischief, either permitted or caused by it.[1]

Now, both the Statute of 1865 and that of 1886 apply to the entire waters of Buzzard's Bay. The earlier act permits the use of a certain mechanical device for taking a certain fish in these waters. The later act forbids the use of certain mechanical devices, especially including the one permitted by the earlier law,[2] for catching all fish. On what line of reasoning can it be assumed that the Legislature intended these statutes to stand together? How can they? Is it on the theory that as the Act of 1886 says, "fish," while the earlier acts say[3] "*fish of any kind.*" that therefore menhaden, being fish of but little value in themselves, they and the appropriate device for catching them may be deemed excepted from the purpose of the later act, which apparently had for its object the preservation of food fish?

This construction might possibly overlook the fact that menhaden, if not food fish, are fish food, and that therefore catching menhaden might be expected to decrease food fish by removing that which attracts and supports them. It may, therefore, well have been that the destruction of menhaden was strictly within the mischief to be remedied by the Act of 1886. If so, the later act must clearly be taken as a repeal of the earlier one.

II. *The United States Fishing License.*

The defendant's claim that in granting a fishing license the Federal Government is supreme, is certainly correct, if it is meant that the Federal Government alone can issue such a license. They are issued under Title L. of the Revised Statutes, entitled, "Regulation of vessels in domestic commerce," secs. 4320 and 4321, and are issued under the familiar power of Congress:[4] "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." It is tolerably plain what the Federal Government undertakes to do in issuing a fishing license, and that is, to state that certain custom-house regulations, necessary for the

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[1] Gorham *v.* Luckett, 6 B. Mon. 146; Com. *v.* Cooley, 10 Pick. 37; Goddard *v.* Boston, 20 Pick. 407, 410; Com. *v.* Flannelly, 15 Gray, 195; U. S. *v.* Barr, 4 Sawyer, 254; Park Commissioners *v.* Brenock, 18 Ill. App. 559; Parrott *v.* Stevens, 37 Conn. 93; Com. *v.* Kelliher, 12 All. 480.

[2] U. S. *v.* Irwin, 5 McLean, 178; U. S. *v.* Barr, 4 Sawyer, 254.

[3] 1856, ch. 176; 1870, ch. 249.

[4] Const. U. S., art. I. sec. 8.

protection and encouragement of domestic commerce and the due collection of customs revenue, have been complied with. It completes the office of the enrollment as to a particular class of vessels. Does a vessel, when so licensed, become (as is claimed) a "chartered libertine," empowered, in the name of the United States, to break any State law, however salutary, relating to the coast fisheries? Massachusetts said "No," in the case of Dunham *v.* Lamphere,[1] decided in 1855. This was *qui tam* action brought by the plaintiff, as fishwarden of Nantucket, against the defendant, as the owner and master of a small fishing vessel, to recover a penalty imposed by Statute 1850, c. 6, which declared that after a certain day it should "not be lawful for any person to take any fish by seining within one mile from the shores of Nantucket, Tuckernuck, Smith's Muskeeket, and Gravel Islands." The defendant set up that he resided in Westerly, in the State of Rhode Island; that he came into Massachusetts, being licensed by the government of the United States, to pursue cod and other fishing; admitted taking fifty bass by seining within one mile of Gravel Island, in pursuance of this license, and in the honest belief that the Legislature of Massachusetts had no right to interfere with and deprive him of his rights acquired by such license. The language of the court is so appropriate as to warrant an extract. In speaking of this branch of the defendant's case, Shaw, C. J., says: —

> The defendant contends that, by the enrollment of his vessel as a coasting and fishing vessel, he derives some peculiar privileges, and insists that he has been licensed to carry on the fisheries in these waters. It is quite true that his vessel has been enrolled under the laws of the United States, pursuant to the provisions of the act of Congress. The effect of this enrollment and license was, to give this vessel all the benefits and privileges of navigating the tide waters of the State, and such rights to bounty and other privileges as are given to fishing vessels by the laws of the United States; but it does not affect the present question.
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> In recurring to the defendant's answer, it will be perceived that he lays great stress upon the facts, that at the time of the alleged seining he was an inhabitant of another State, that he was master and part owner of a fishing vessel, enrolled in conformity with the laws of the United States, and he insists on this ground so earnestly, that it would seem that he and his legal advisers considered it the main ground of defence.

[1] 3 Gray, 268.

At first we were led, from this statement of defence, to suppose that this act, like some others which have been passed in this Commonwealth, contained provisions prohibiting or impeding the citizens and inhabitants of other States in the enjoyment of rights and privileges allowed to our own citizens. But upon recurring to the act, it is clear that there are no discriminating provisions in favor of the citizens of this Commonwealth, but that all the restraints and prohibitions of the statute operate in precisely the same manner on citizens of the Commonwealth and those of other States. We may fairly presume, therefore, that these enactments were all designed to preserve and improve the fishery, for the benefit of any and all persons entitled to enjoy the advantages of it. And surely those inhabitants of other States, who come within the territorial limits of this State, and thereby owe a temporary allegiance, and become amenable to its laws, have no just reason to complain, if, when within those limits, and enjoying benefits in common with our own citizens, they are bound to conform to a salutary law, necessary for the common good. It deprives them of no benefit or privilege which the constitution and laws of the United States could give, or do profess to give them,— that of a free navigation in and over all the navigable waters of the State.

The case does not consider the question of the maritime or admiralty jurisdiction of the United States, it being a point not raised. Neither was the jurisdiction of the court, sitting for the county of Nantucket, questioned, though the place was clearly not within the body of the county at common law, and the statute[1] had not then been enacted. There was no legislation giving the county of Nantucket special jurisdiction, unless the phrase "an action of debt, in any court of record proper to try the same,"[2] can be so considered. The court considers the *locus in quo* as within the "territorial limits" of Massachusetts, which are given[3] as "a marine league, or three geographical miles, from the shore." Had the point of jurisdiction been raised, the court probably would have held that the Nantucket court had jurisdiction, by the effect of the act itself, and that boundaries of counties were coextensive with the limits of the Commonwealth, for all purposes not affected by the constitution and laws of the United States.[4]

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[1] General Statutes, ch. 1, § 1.

[2] 1850, ch. 6, sec. 6.

[3] 3 Gray, at 270.

[4] Com. *v.* Peters, 12 Metc. 387; Com. *v.* Alger, 7 Cush. 53, 82; Com. *v.* Roxbury, 9 Gray, 451, 494; Pollard *v.* Hagan, 3 How. 212, 230.

The same conclusion as to the validity of a fishing license, to justify infraction of a State law relating to fish, was reached in the case of Smith *v.* Maryland.[1] A Maryland statute[2] provided that it should "be unlawful to take or catch oysters in any of the waters of this State with a scoop or drag, or any other instrument than such tongs and rakes as are now in use, and authorized by law; and all persons whatever are hereby forbid the use of such instruments in taking or catching oysters in the waters of this State, on pain of forfeiting to the State the boat or vessel employed for the purpose, together with her papers, furniture, tackle, and apparel, and all things on board the same." The original defendant, plaintiff in error, being a citizen of Pennsylvania, was the owner of a sloop called the "Volant," which was regularly enrolled and *licensed* to be employed in the coasting trade and fisheries. This vessel was seized by the sheriff of Anne Arundel County, while engaged in dredging for oysters in the Chesapeake Bay, and was condemned to be forfeited to the State of Maryland. The forfeiture being sustained in the State courts, the defendant brought a writ of error to the Supreme Court of the United States. The Supreme Court, by Curtis, J., thus dispose of the question of the fishing license, expressly, however, it may be observed, declining to discuss the question as to whether the waters in which the acts were committed were within the territorial limits of Maryland, on the ground that this point was not before them: "It is the judgment of the court that it is within the legislative power of the State to interrupt the voyage and inflict the forfeiture of a vessel enrolled and licensed under the laws of the United States, for a disobedience, by those on board, of the commands of such a law." The judgment of the Maryland courts was affirmed with costs.

Haney *v.* Compton[3] is to the same effect. The action was replevin. The plaintiffs charged the defendant with taking their schooner, the "Roda L. Loper," in the waters of Maurice River Cove, with her sails, anchors, and appurtenances. The defendant's avowries admitted the taking, and justified under the New Jersey statute relating to clams and oysters,[4] providing that "it shall be unlawful for any person who is not at the time an actual inhabitant or resident of this State . . . to rake or gather clams, oysters, or

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[1] 18 Howard, 71 (1855).
[2] 1833, ch. 254.
[3] 36 New Jersey Law, 507.
[4] Rev. Stat. M. J. p. 136.

shell-fish . . . in any of the . . . waters of this State, on board of any canoe, flat, scow, boat, or other vessel," and decreeing a penalty and forfeiture upon conviction. The defendant set up that this was a regulation of commerce, and abridged the privileges of citizens of the United States. On the matter of the license, the court say: "It cannot with any propriety be said that a statute which simply prohibits non-residents on board a vessel from subverting the soil of the State or carrying away her property, or that of her grantees, leaving such vessel to pass and repass, and go whithersoever those in charge of her desire, is a regulation of commerce with foreign nations or among the States. It is a law for the protection of property,—at most an internal police regulation entirely within the competency of the State to adopt, and it is not perceived that it can by possibility interfere with commerce in the sense in which that word is used in the Federal Constitution."

To the same effect is McCready *v.* Virginia, 94 U. S. 391.

Except so far as a distinction can be drawn between floating fish and shell-fish, — and none seems possible,—these four cases are to precisely the same effect.[1]

The difficulty with the defendants' contention, that a fishing license gives the right to fish, as a matter of federal regulation, lies, as is pointed out in Dunham *v.* Lamphere,[2] in confusing the two great public rights in tide water, — fishing and navigation. It is easy to confuse them, for they have points of resemblance as well as those of difference. Of the two, navigation is paramount.[3] It is public beyond question.[4] It extends, when the tide is in, even over flats made private property.[5] But it is a right *jure gentium*, particularly within the province of the national government, as representing the sovereignty of the entire country. It is not an incident of or attaching to any particular waters or the soil under them. Conceding to the utmost ownership

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[1] Packard *v.* Ryder, 144 Mass. 440; Com. *v.* Manimon, 136 Mass. 406.

[2] 3 Gray, 268, 275.

[3] Post *v.* Munn, 1 South.*61; Colchester *v.* Brooke, 7 Q. B. 339; Cobb *v.* Bennett, 75 Pa. St. 326; Moulton *v.* Libbey, 37 Me. 472; Mason v. Mansfield, 4 Cranch C. C. 580. But see People's Ice Co. *v.* Excelsior, 44 Mich. 229.

[4] Reg. *v.* Keyn, 13 Cox C. C. 403, 419 (Sir R. Phillemore); Com. *v.* Essex Co., 13 Gray, 239, 247; Boston, etc. Steamboat Co. *v.* Munson, 117 Mass. 34.

[5] Draper *v.* Curtis, 1 Cush. 413; Com. *v.* Alger, 7 Cush. 53, 74; Boston *v.* Lecraw, 17 How. 433; Deering *v.* Long Wharf, 25 Me. 65; Gerrish *v.* Union Wharf, 26 Me. 392.

of soil or the most complete jurisdiction to the government owning adjacent shores, the free right of friendly navigation must be conceded to all comers. This was agreed by all the judges in the case of Reg. *v.* Keyn,[1] — that whatever might be the jurisdiction of England over the waters within the three mile limit, in which the death occured, the right of the German steamer to navigate there on an errand of friendly commerce was undoubted.[2] With this incident of the federal power of regulating commerce the fishing license deals. It gives all the power the Federal Government can give in the matter of local fisheries: it gives the right to go. But it by no means includes by necessary implication a right to fish when the licensed vessel gets there.

It is not doubted, indeed, that the State can regulate the navigation of its tidal waters, so far at least as not to conflict with the regulations of Congress.[3] Upon the general rule that all tide waters are navigable, a limitation has even been suggested, — that the object of the navigation be useful to trade or agriculture.[4] But the right of navigation for pleasure is held to be equally public.[5] The early rules of the common law as to "navigable waters" do not always happily adjust themselves to the circumstances of a new country. As stated in Com. *v.* Vincent,[6] the phase "navigable waters," as commonly used in the law, has three distinct meanings: 1st, as synonymous with "tide waters," being waters, whether salt or fresh, wherever the ebb and flow of the tide from the sea is felt;[7] or, 2d, as limited to tide waters which are capable of being navigated for some useful purpose;[8] or, 3d (which has not prevailed in this Commonwealth), as including all waters, whether within or beyond the ebb and flow of the tide, which can be used for navigation.[9] But, as stated, the matter is particularly within the province of the Federal Government.[10]

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[1] L. R. 2 Exch. Div. 63; 13 Cox C. C. 403. See also Massé, Droit Commercial, Bk. 2, tit. 2, chap. 7, art. 105.

[2] See *post*, p. 370.

[3] Rowe *v.* Granite Bridge, 21 Pick. 344; Com. *v.* Alger, 7 Cush. 53; Atty.-Gen. *v* Woods, 108 Mass. 436; Atty.-Gen. *v.* B. & L. R. R,. 118 Mass. 345.

[4] Rowe *v.* Granite Bridge Co., 21 Pick. 344; Murdock *v.* Stickney, 8 Cush. 113; Charlestown *v.* County Commissioners, 3 Metc. 202.

[5] Att.-Gen. *v.* Woods, 108 Mass. 436.

[6] 108 Mass. 441, 447.

[7] Com. *v.* Chapin, 5 Pick, 199; Atty.-Gen. *v.* Woods, 108 Mass. 436.

[8] Rowe *v.* Granite Bridge Co., 21 Pick. 344; Murdock *v.* Stickney, 8 Cush. 113, 115.

[9] Waters *v.* Lilley, 4 Pick. 145, 147; Genesee Chief *v.* Fitzhugh, 12 How. 443; The Daniel Ball, 10 Wall. 557.

[10] Passenger Cases, 7 How. 445; Wheeling Bridge Case, 13 How. 518; Tonnage Cases, 12 Wall. 204; Welton *v.* Missouri, 91 U. S. 275.

The right of fishing in the sea and other tide waters, like that of navigation, is public,[1] The rule applies also to shell-fish.[2]

Massachusetts herself, it so happens, has gone exceptionally far in recognizing this public right of fishing in tide waters. By the Colonial Ordinance of 1641–7,[3] applying originally to the territory covered by the Massachusetts Bay Colony, but extended by judicial construction to Plymouth Colony,[4] to Maine,[5] and Martha's Vineyard,[6] the ownership of the seashore[7] and flats between high and low water marks to the distance of one hundred rods was given to the littoral proprietor, provided navigation[8] is not impeded. By the common law of England, the ownership of the seashore to high-water mark was in the Crown, subject to the public right of fishing and, when the tide was in, navigation.[9]

After Magna Charta, even the Crown could not devest the seashore of this *jus publicum;* the grantee took the *jus privatum* of the seashore to low-water mark, subject to the public rights of navigation and fishing.[10] Being, therefore, among the regalia or incidents of sovereignty, this trust for the protection of the public rights could not be aliened by royal grant. Nothing but an act of Parliament, exercising all the powers of dominion and sovereignty, could convey the sea bed discharged of this trust.[11]

In derogation of this rule of the common law, the ordinance of

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[1] Carter *v.* Murcot, 4 Burr. 2162; Warren *v.* Matthews, 1 Salk. 357; Blundell *v.* Catterall, 5 B. & Ald. 268; Wooley *v.* Campbell, 37 N. J. L. 163; Corfield *v.* Coryell 4 Wash. C. C. 371, 381; Weston *v.* Sampson, 8 Cush. 347; Com. *v.* Alger, 7 Cush. 53; Dunham *v.* Lamphere, 3 Gray. 268; Com. *v.* Peters, 12 Metc. 387; Proctor *v.* Wells, 103 Mass. 216; Arnold *v.* Mundy, 6 N. J. L. 1; Paul *v.* Hazleton, 37 N. J. L. 106; Moulton *v.* Libbey, 37 Me. 472.

[2] Bagott *v.* Orr, 2 Bos. & Pul. 472; Martin *v.* Waddell, 16 Peters, 414; Weston *v.* Sampson, 8 Cush. 347; Com. *v.* Manimon, 136 Mass. 456.

[3] Anc. Charters (ed. of 1814), chap. 63, ss. 2, 3, 4; Com. *v.* Alger, 7 Cush. 53, 67.

[4] Barker *v.* Bates, 13 Pick. 255, 258.

[5] Storer *v.* Freeman, 6 Mass. 435; Codman *v.* Winslow, 10 Mass. 146; Lapish *v.* Bangor Bk., 8 Greenl. 45.

[6] Mayhew *v.* Norton, 17 Pick. 357.

[7] Sale *v.* Pratt, 19 Pick. 191, 197.

[8] Drake *v.* Curtis, 1 Cush. 395, 413.

[9] Hale, *De Jure Maris*, chap. 4; Coulson on Waters, p. 343; Hall on the Seashore, 42; Fitzwalter's Case, 1 Mod. 105; Warren *v.* Matthews, 6 Mod. 73; Orford *v.* Richardson, 4 T. R. 437; Crichton *v.* Collery, 19 W. R. 107; Blundell *v.* Catterall, 5 B. & Ald. 268; Malcomson *v.* O'Dea, 10 H. L. Cases, 593, 618; Middleton *v.* Sage, 8 Conn. 221.

[10] Bracton, lib. I. chap. 12, sec. 6.

[11] Lowe *v.* Govett, 3 B. & Ald. 863; Rex *v.* Montague, 4 B. & C. 598; Atty-Gen. *v.* Burridge, 10 Price, 350. See Celsus, D. 43. 8, 3.

1641–7, as has been said, gives the ownership of the seashore to the owner of the upland, the object being the encouragement of commerce by permitting the erection of wharves, etc.[1] Yet even in this strong case, where the ownership is granted, under a power analogous to that of Parliament, to the individual for the express purpose of enclosures for wharves or agricultural cultivation, so persistently does the *jus publicum* of fishing inhere in the sea bed, that it is not ousted until the enclosure or conversion actually takes place. As said by Shaw, C. J.,[2] "For fishing and fowling persons may pass over another man's property, of course including these shores thus [by the ordinance] made private property; this restores the public right to pass on foot over flats or places over which the sea ebbs and flows, so long as they are not actually reclaimed and converted[3] into tillage or mowing land." Until such enclosure or conversion, the public may freely dig clams or other shell-fish,[4] though no more of the soil can be removed than naturally adheres to the surface of the living shell-fish.[5] The public can also go on this seashore, with its qualified private ownership, landing from boats, and walk along the beach for the purpose of catching floating fish.[6]

The rule as to shell-fish obtains generally throughout the country.[7] But outside of Maine and Massachusetts, it is an ordinary incident of the general right of fishing.[8] In these States, the object of the Colonial Ordinance of 1641–7 is apparently attained by permitting the littoral proprietor to build out walls without regard to his title in the soil under the water, — always provided he does not obstruct navigation.[9] The State owns the flats and sea bed beyond the one hundred rod limit of the Colonial

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[1] Com. *v.* Charlestown, 1 Pick. 180, 183; Storer *v.* Freeman, 6 Mass. 435, 438; Sparhawk *v.* Bullard, 1 Metc. 95, 108; Com. *v.* Alger, 7 Cush. 53, 77, 94; Com. *v.* Roxbury, 9 Gray, 451, 515. But see Walker *v.* Boston & Maine R.R., 3 Cush. 1, 24.

[2] Com. *v.* Alger, 7 Cush. 53, 68.

[3] Proctor *v.* Wells, 103 Mass. 216; Lakeman *v.* Burnham, 7 Gray, 437; Parker *v.* Cutler Mill Dam Co., 7 Shepl. 353; Locke *v.* Motley, 2 Gray, 265.

[4] Weston *v.* Sampson, 8 Cush. 347; Lakeman *v.* Burnham, 7 Gray, 437; Proctor *v.* Wells, 103 Mass. 216; Com. *v.* Bailey, 13 All. 541.

[5] Porter *v.* Shehan, 7 Gray, 435; Moore *v.* Griffin, 22 Me. 350.

[6] Packard *v.* Ryder, 144 Mass. 441.

[7] Peck *v.* Lockwood, 5 Day, 22; Paul *v.* Hazelton, 37 N. J. L. 106; Oyster Co. *v.* Baldwin, 42 Conn. 255; Preble *v.* Brown, 47 Me. 284.

[8] Church *v.* Meeker, 34 Conn. 421.

[9] Simons *v.* French, 25 Conn. 346; Clement *v.* Burns, 43 N. H. 609, 617, Dutton *v.* Strong, 1 Black, 23, 31, 32; Gates *v.* Milwaukee, 10 Wall. 497, 504.

Ordinance.[1] So, islands formed below low-water mark belong to the Commonwealth.[2]

But while the right of fishing in tide waters resembles that of navigation in that it is public, it differs from navigation in a very important particular which lies very near the root of this entire matter, viz., fishing is a right which is *attached to the soil as an incident of its ownership.* In other words, fish are a part of the national wealth. Whether, even before being reduced to possession, they are in strictness *property*, as considered by Vattel,[3] or are *res nullius* until reduced to possession,[4] fish or the right to reduce them to possession are part of the national domain.[5] Wheaton[6] says that "the right of fishing in the waters adjacent to the coast of any nation within its territorial limit belongs exclusively to the sovereigns of the State."[7] Leaving the vexed question of "territorial limit" for subsequent examination, we are concerned with the municipal nature of the right to fish. It seems a natural corollary from the State's ownership.[8] But this ownership is clearly of a peculiar and limited nature. The State holds as owner for the purposes of government, for the benefit of the governed; in other words, as a trustee for its citizens.[9] With few exceptions, it is bound to recognize no one else. The common law of England from very early times recognized precisely this restricted ownership. By that law, the *jus privatum*, or ownership of the soil in the tide waters of the seashore or the sea bed, was in the king, as sovereign, and was a right susceptible of alienation.[10] But the

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[1] Com. *v.* Pierce, 2 Dane's Abr. ch. 68, art. 4, § 3; Com. *v.* Crowninshield, Sullivan, Land Titles, 286; Mill Corporation *v.* Newman, 12 Pick. 467, 476; Com. *v.* Alger, 7 Cush. 53, 92; Com. *v.* Roxbury, 9 Gray, 451, 497.

[2] Hopkins Academy *v.* Dickinson, 9 Cush. 544, 550; Middletown *v.* Sage, 8 Conn. 228.

[3] Book I. §§ 234, 235.

[4] Grotius, *De Jure Belli*, lib. 2, ch. 2, ss. 4, 5.

[5] Corfield *v.* Coryell, 4 Wash. C. C. 371, 382; Dunham *v.* Lamphere, 3 Gray, 267.

[6] Intern. Law, p. 258.

[7] Gammel *v.* Commrs., 3 Macq. 149; Schultes, Aquatic Rights, 3; Chitty, Prerogative, 100; Vattel, tit. 1, ch. 23; Puffendorf, IV. 4; VII. 8; Craig, Jus. Feud. lib. I. 15, § 13; Martens, Précis du Droit, § 153.

[8] Haney *v.* Compton, 36 N. J. L. 507, 511; Johnson *v.* Drummond, 20 Gratt. (Va.) 419, 425; Corfield *v.* Coryell, 4 Wash. C. C. 371, 379.

[9] See Moore *v.* Sanford, S. J. C. Mass. not yet reported.

[10] Weston *v.* Sampson, 8 Cush, 347, 351; Storer *v.* Freeman, 6 Mass. 435; Martin *v.* Waddell, 16 Peters, 422; State *v.* Sargent, 45 Conn. 358, 372. See Selden, Mare Clausum, c. 22, 24; Bacon's Abr., tit. Prerogative, B. 3; Hall on the Seashore, 13; Co. Litt.

king, or, in case of alienation, his grantee, held these lands subject to and in trust for the *jus publicum* of navigation and the fisheries.[1] This double right was apparently transferred to the colonies by the royal charters, which aliened to the grantees named therein not only the ownership of the soil, so far as relates to the *jus privatum*, but also the *jura regalia*, or prerogative rights of the Crown, to be held for the colonies as the Crown held them for the realm of England.[2] The State therefore holds both the right of the king and of Parliament.[3] Or, as stated in Lakeman *v.* Burnham,[4] "The people and settlers of the territory acquired not only the right of soil, but a right to the shores and arms of the sea, for all useful purposes of navigation and fishery."

Whether under these grants any elements of sovereignty other than that of allegiance remained in the Crown, as related to the soil of the colonies, including the seashore and lands under the sea, is of small importance; as these elements of sovereignty became vested in the respective colonies upon their being recognized as sovereign and independent States by the definitive treaty of Paris,[5] by which His Britannic Majesty, "for himself, his heirs and successors," relinquished "all claim to the government, property, and territorial rights of the same in any part thereof."[6] The ownership of the soil, including that under tide water, became absolute in the State,[7] subject only to the same limitations as when held by the Crown; viz., that in whomever might be the *jus privatum* of the seashore or the sea bed, such owner held subject to the *jus publicum*, which, as stated, principally covered navigation and fisheries. It cannot be contended that, upon the formation of the Federal Government, the strict ownership of the State in the sea-

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107 a, 200 a; 4 Inst. 60; 2 Roll. Abr. 169, 170; Staunford's Abr.; Life of Sir Leoline Jenkins, vol. 2, p. 732; Justice's Sea Laws, art. 1.

[1] Com. *v.* Alger, 7 Cush. 53, 90; Hale *De Jure Maris*, chap. 6; Dunham *v.* Lamphere, 3 Gray, 268; Clement *v.* Burns, 43 N. H. 609, 616.

[2] Dill *v.* Wareham, 7 Metc. 438; Com. *v.* Alger, 7 Cush. 53; Gough *v.* Bell, 21 N. J. L. 156; Brown *v.* Kennedy, 5 Harris & J. 195; Martin *v.* Waddell, 16 Peters, 367; Com. *v.* Roxbury, 9 Gray, 451, 481; Boston *v.* Richardson, 105 Mass. 351, 356; People *v.* Ferry Co., 68 N. Y. 71.

[3] Nichols *v.* Boston, 98 Mass. 39.

[4] 7 Gray, 437.

[5] Sept. 3, 1783.

[6] Dunham *v.* Lamphere, 3 Gray, 268; New Orleans *v.* United States, 10 Peters, 662; Pollard *v.* Hagan, 3 How. 212.

[7] Corfield *v.* Coryell, 4 Wash. 371, 385; Bennett *v.* Boggs, 1 Bald. 60, 72; Pollard *v.* Hagan, 3 How. 312; Gough *v.* Bell, 1 Zab. 156; Weston *v.* Sampson, 8 Cush. 347.

shore and sea bed, *i. e.*, the *jus privatum*, was transferred to the general government. Whatever the territorial limits of the original maritime States may have been at the time of the formation of the Federal Union, it is clear that no part of their territory passed to the Union then formed. The powers of the Federal Government were not those of ownership: they are those of sovereignty; of jurisdiction, rather than of territorial dominion.[1]

Whatever, therefore, may be the federal rights in the public domain or undivided lands, the United States in the original colonies owns only such places as have been ceded.[2] This disposes of the question of the *jus privatum*. But the further question is readily suggested: Has the control of the *jus publicum* in tide waters been ceded to the national government so far as relates to the fisheries? No specific grant of such a power is found in the Constitution. The nearest approach, so far as interstate relations are concerned, is apparently the power to regulate commerce. This brings with it, within certain limitations, the right to regulate navigation. The peculiar propriety of this delegation of power has been referred to. But fish are *feræ naturæ*; until caught they are not objects of commerce, and when caught become the property of the captor, not substantially differing from other property.[3]

While, therefore, the right of navigation, being within the scope of the regulation of commerce, and a right *jure gentium*, is naturally ceded to the national government; the right of fishing, being a right concerning a portion of the property attached to the State domain, part of the common wealth, is a matter purely of municipal regulation. Not only, therefore, in the absence of any specific grant, does it not pertain to the general government,[4] but there are strong *a priori* reasons why it would be unusual that it should. The matter is so settled by authority. It has been decided in Massachusetts[5] and in the United States courts[6] that the right to regulate the fisheries within their territorial limits belongs to the

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[1] Martin *v.* Waddell, 16 Peters, 367.

[2] Pollard's Lessee *v.* Hagan, 3 How. 212; Munford *v.* Wardwell, 6 Wall. 423, 436; Weber *v.* Harbor Commrs., 18 Wall. 57, 66.

[3] Corfield *v.* Coryell, 4 Wash. C. C. 371, 380; McCready *v.* Virginia, 94 U. S. 391.

[4] Corfield *v.* Coryell, 4 Wash. C. C. 371.

[5] Dunham *v.* Lamphere, 3 Gray, 268; Com. *v.* Alger, 7 Cush. 53, 82. See also 2 Dane's Abr. ch. 68, art. 2; Gough *v.* Bell, 1 Zab. 156; s. c. 2 Zab. 441.

[6] Smith *v.* Maryland, 18 How. 74; Corfield *v.* Coryell, 4 Wash. C. C. 371; Bennett *v.* Boggs, 1 Bald. 60, 72; McCready *v.* Virginia, 94 U. S. 391.

several States as an incident of ownership,[1] and was not transferred to the general government.[2]

The practical interpretation which the legislation of the maritime States has placed upon the question of the regulation of tide fisheries within their territorial limits, is to the same effect.[3] Much legislation, it may be noted, confines the benefits of the fisheries to citizens of a particular State. For example, New Jersey limits the benefits of her oyster fisheries to her own citizens. And such legislation is valid,[4] even in view of the provisions of the Constitution,[5] declaring that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."[6] So of Massachusetts.[7]

The right of the State to regulate tidal fisheries has even been so far extended in Massachusetts as to apply beyond the limits of tide influence to the control of the migratory food fish,— herring, alewives, salmon, and shad,— which, frequenting tide waters during certain seasons of the year, return to their spawning grounds — usually large fresh-water ponds — through non-tidal streams or rivers connecting with the sea.[8] The State regulates these in various ways; *e. g.*, by compelling the erection of fish ways in dams erected across the streams,[9] or by absolutely forbidding any taking of the same during their passage. And it has even been held that although in a non tidal stream the riparian proprietor owns to the thread of the stream, and has the exclusive right of fishing in the waters adjoining his premises,[10] such riparian right of fishing may be forbidden by the Legislature, with no necessity

[1] Vattel, Bk. 1 § 246.

[2] Cooley *v.* Wardens, 12 How. 299; Gilman *v.* Philadelphia, 3 Wall. 713; Com. *v.* Alger, 7 Cush. 53, 81; New Orleans *v.* U. S., 10 Peters, 662, 737; Pollard *v.* Hagan, 3 How. 212; State *v.* Medbury, 3 R. I. 138.

[3] Tinicum Fishing Co. *v.* Carter, 61 Pa. St. 21; Hettrick *v.* Page, 82 N. C. 65; Bickell *v.* Polk, 5 Harr. 325.

[4] Paul *v.* Hazelton, 8 Vroom, 106; Morley *v.* Campbell, 8 Vroom, 166; Canal Co. *v.* R. R. Co., 1 C. E. Green, 366; State *v.* Medbury, 3 R. I. 138; Oyster Co. *v.* McGarvey, 12 R. I. 385; Corfield *v.* Coryell, 4 Wash. C. C. 371, 380.

[5] Art. 4 § 2.

[6] Dunham *v.* Lamphere, 3 Gray, 267, 276.

[7] Stat. 1886, chap. 299; Dunham *v.* Lamphere, 3 Gray, 267, 275.

[8] Dane's Abr. ch. 68, art. 6, § 1

[9] Stoughton *v.* Baker, 4 Mass. 522; Com *v.* Chapin, 5 Pick. 199; Vinton *v.* Welsh, 9 Pick. 89; Com. *v.* Essex Co., 13 Gray, 239, 248; Commrs. *v.* Holyoke Water Power Co. 104 Mass. 446.

[10] Waters *v.* Lilly, 4 Pick. 145; Vinton *v.* Welsh, 9 Pick. 89; McFarlin *v.* Essex Co. 10 Cush. 304, 309; Commrs. *v.* Holyoke Co., 104 Mass. 446, 456.

of rendering compensation, even under a statute which requires a town taking such a stream "to pay all damages." [1]

Contrariwise, the Massachusetts Legislature has assumed to regulate the public right of fishing in tidal waters by restricting as well as extending its exercise. For the purpose of encouraging the cultivation of useful fishes in salt-water, the owner of land bordering upon a tidal stream which . . . "on the average throughout the year . . . has a channel less than forty feet wide and four feet deep during the three hours nearest the hour of high tide," [2] has the exclusive right to fish on his own premises [3] and within a certain distance around the mouth of the stream.[4] It may be observed that much of the benefit to the cultivation of useful fishes possible under those laws is nullified by a decision of the Supreme Court in the case of Eastham *v.* Anderson,[5] limiting the application of these sections to cases where the fish are *actually enclosed.* Just how the court expected that trout, which spawn on gravel in the upper waters of a stream, and annually frequent tide waters beyond its mouth, can successfully be cultivated by a riparian tidal proprietor in an enclosure anywhere on the stream, remains unsolved by followers of "the gentle craft."

The Legislature, it has been held, may even destroy the public fishery in tide waters.[6] In fact, without following this legislation into further detail, it may be said that it would be difficult, in view of the almost yearly legislation as to tidal fisheries, their seasons, means of capture, etc., to find a subject of legislative control more carefully and minutely regulated than these same fisheries. Such legislation is too voluminous and persistent to require or justify extended citation.

It may be summed up by saying that the statement of Denman, J.,[7] — "the preservation of the spawn, fry, or brood of fish has been for centuries a favorite subject of legislation," — is equally true of this country.[8]

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[1] Cole *v.* Eastham, 133 Mass. 65.

[2] Pub. Stats., chap. 91, § 28.

[3] Pub. Stats., chap. 91, §§ 27, 31.

[4] Nickerson *v.* Brackett, 10 Mass. 212; Cleaveland *v.* Norton, 6 Cush. 380; Russell *v.* Russell, 15 Gray, 159.

[5] 119 Mass. 526.

[6] Howes *v.* Grush, 131 Mass. 207.

[7] Mayor of Maldon *v.* Woolvet, 12 A. & E. 13.

[8] See Anc. Charters, 114, 254.

Under this course of legislation much money has been invested in these fisheries; large sums are yearly paid out in the form of wages, while the investments of money more indirectly affected by this legislation, *e. g.*, hotel and seashore property, are still larger in amount. If the matter is not one of municipal legislation, it is late to discover it. The fact that the State frequently employs town agencies through which more conveniently to give its citizens the benefit of the State ownership of the seashore or sea bed, in oyster licenses, weir permits, etc., does not hide the fact that the ownership and regulation of tide waters and their fisheries is vested solely in the State, — who makes use of these agencies simply for its own purposes. Towns have no corporate ownership of the public fisheries within their limits.[1] Nor does their jurisdiction for certain purposes imply ownership.[2] Town officers and county commissioners cannot lay out highways over tide waters.[3] It may be concluded, therefore, that, from the State's point of view, the fisheries are subject to State regulation.

The correctness of this view is rather confirmed by the fact that Congress has as yet not undertaken to make any regulation of those fisheries within the State territorial limits. The nearest approach to such a regulation is probably an act approved Feb. 28, 1887,[4] by which the importation into the United States of mackerel, other than Spanish mackerel, caught in the spawning season, *i. e.*, from March 1 to June 1, is prohibited for five years from March 1, 1888. By a special proviso, the act does not apply to "mackerel caught with hook and line from boats, and landed in said boats, or in traps and weirs connected with the shore." The object of this law is obvious. It does not purport to regulate the State fisheries, which are apparently expressly excluded; but it is a regulation of commerce, and prevents the importation of certain articles of food at a time regarded as prejudicial to the public interest. The commercial nature is, perhaps, further shown in the fact that the effect of the act is added as a condition

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[1] 2 Dane's Abr. ch. 68, art. 4, §§ 6 *et seq.*; Dill *v.* Wareham, 7 Metc. 446; Coolidge *v.* Williams, 4 Mass. 140, 144; Randolph *v.* Braintree, 4 Mass. 315; Rowe *v.* Smith, 48 Conn. 444; Spear *v.* Robinson, 29 Me. 531.

[2] Com. *v.* Roxbury, 9 Gray, 451, 494.

[3] Austin *v.* Carter, 1 Mass. 231; Com. *v.* Coombs, 2 Mass. 489; Arundell *v.* McCullogh 10 Mass. 70; Charlestown *v.* Commrs., 3 Metc. 202; Kean *v.* Stetson, 5 Pick. 92; Marblehead *v.* Co. Commrs., 5 Gray, 451; Com. *v.* Roxbury, 9 Gray, 451, 494.

[4] Stats. at Large, vol. 24, p. 434.

of the "fishing license" granted under Rev. Stats. U. S., sec. 4321, which we have seen to be a commercial regulation.

But the defence in the Manchester case, while possibly admitting that there has been no such direct regulation by Congress of the fisheries in State territorial limits, or in limits claimed by a State, still contend that the United States has asserted its right to control these fisheries by virtue of another constitutional power, viz., the treaty-making power of the executive. It is said that in the reciprocity treaties with Great Britain of 1854, abrogated in 1866, and in that of 1871, also since abrogated, the United States agreed, as one of the high contracting parties, "that British subjects shall have, in common with citizens of the United States, the liberty to take fish of every kind, except shell-fish, on the eastern coasts and shores of the United States north of the thirty-sixth parallel of north latitude, and on the shores of the several islands thereunto adjacent, and in the bays, harbors, and creeks of the said sea coast and shores of the United States and of the said islands, without being restricted to any distance from the shore."

It is easier to admit the truth of this than to see its application. These treaties have ceased to be operative. Nor is it quite evident how the fact that a Canadian could, during a certain period of the past, have fished in certain waters "in common with" Massachusetts citizens, *i. e.*, to the same extent that they could, tends to show that an American citizen from Rhode Island can fish, after that time, in a manner that a Massachusetts man could not. Possibly the argument is that the treaty-making power, being applied to local fisheries, is predicated upon a general right to control them, and probably, as a second step, that the control is exercised in granting a "fishing license." The conclusion does not follow. The precise limits of the treaty-making power *quoâd* State rights are not quite definitely fixed. But it seems clear that the States may well have delegated to the general government, who can alone represent them with foreign nations, the power of disposing of certain State privileges to those nations for what may be deemed sufficient equivalents. The general government, in this aspect of the matter, acts as the agent of the State, and may well barter away, in treaty with a foreign nation, rights of the State, which it is well agreed, as between the general and the State sovereignty, belong to the State. It is, therefore, by no means clear that because the President has affected to give British subjects certain

rights of participation in the State fisheries, that therefore the Federal Government either has the right to control the State fisheries, or indeed claims to have it.

III. *The offence was not committed in Massachusetts.*

The fishing being done, as is agreed, within a mile and a quarter of the Falmouth shore, at a place inside headlands less than two marine leagues apart, but more than one (from "Westport in the county of Bristol on the one side, and the island of Cuttyhunk in the county of Dukes County on the other side"),[1] so far apart that objects cannot be readily discerned from headland to headland, it is contended that this is not an offence committed within the jurisdiction of Massachusetts, and therefore not triable in its courts. No contention is made but that if the case is triable in a Massachusetts court, the venue is properly laid in the county of Barnstable.[2] Reliance in this connection is placed by the defendant upon the provision of the Federal Constitution,[3] that "the judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction." The contention is, that at the time of the adoption of the Federal Constitution, by English law, which was the law of the colonies, the boundary between the common law and the admiralty jurisdiction as regards the open sea was the water line;[4] that, so far as regards the seashore opposite the open sea, the state of the tide determined the jurisdiction, — when the tide was out, the common-law jurisdiction attaching, when the tide was in, the admiralty.[5] That upon the adoption of the Federal Constitution this admiralty and maritime jurisdiction was entirely ceded to the general government, leaving nothing of admiralty jurisdiction in the maritime States. That this admiralty and maritime jurisdiction thus vested in the general government is not less ample, and in some respects more ample, than the admiralty jurisdiction of England, above stated.[6]

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[1] Report, p. 1.

[2] Pub. Stats., chap. 1, sec. 1; chap. 22, sec. 1; chap. 27, sec. 2.

[3] Art. 3, sec. 2.

[4] 1 Steph. Comm. 114; 1 Kent, Comm. 366.

[5] Constable's Case, 5 Co. 107, 110; 1 Kent, Comm. 367; U. S. *v.* Grush, 5 Mason, 290; Story, Const. § 1673; The Admiralty, 12 Co. 79, 80; Reg. *v.* Tallow, 2 Hagg. 294; The Pauline, 2 C. Rob. 358; Embleton *v.* Brown, 3 E. & E. 234; Reg. *v.* Musson, 8 E. & B. 900; Rex. *v.* Brandy, 3 Hagg. 257; Lopez *v.* Andrew, 3 M. & K. 329.

[6] De Lovio, *v.* Boit, 2 Gal. 471; Waring *v.* Clark, 5 How. 458; Genesee Chief *v.* Fitzhugh, 12 How. 443; The Lottawanna; 21 Wall. 558; The Daniel Ball, 10 Wall, 557.

And that this jurisdiction is exclusive.[1] (But see Chase *v.* Steamboat Co.,[2] to the effect that prior to the Union the county courts had concurrent jurisdiction within a marine league from the shore with the courts of admiralty, and that this concurrent jurisdiction still remains.) The result is reached that the Commonwealth of Massachusetts can have no jurisdiction over the offence committed below low-water mark, within the exclusive, cognizance of the United States admiralty and maritime jurisdiction, it being conceded that this jurisdiction applies to crimes committed on the high seas, and not within the body of any county.[3]

Apparently the difficulty with the contention is this : The grant of exclusive admiralty and maritime jurisdiction which the original maritime States of the Union clearly possessed upon the declaration of the Treaty of Paris and before the adoption of the Federal Constitution, from these States to the national government, like other similar grants, gave Congress power to assume this jurisdiction by appropriate legislation, and left the admiralty and maritime jurisdiction in the States, so far as not assumed by Congress.[4] So it is not to be doubted but that Congress can assume jurisdiction over all offences committed on tide water to the full extent of the English admiralty jurisdiction.[5] Has Congress done so? The Crimes Act of the United States[6] provides, in section, 5339, for the punishment of crimes committed on "the high seas or in any arm of the sea, or in any river, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, *and out of the jurisdiction of any particular State.*" The final words of this section, which was originally passed in 1790, are important, as showing the limit of the admiralty jurisdiction assumed by the United States. Whatever is within the State's jurisdiction is not within the admiralty jurisdiction of the general government. Congress has seen fit to limit itself as beginning where the State jurisdiction leaves off.[7] What, then, is the State's jurisdiction over

[1] 1 Kent, Comm. 397 ; U. S. *v.* Grush, 5 Mason, 290 ; Com. *v.* Peters, 12 Metc. 387.

[2] 9 R. I. 419.

[3] 2 Brown's Civil Law and Admr. 263, 274 ; 1 Kent, Comm. 360, 363 ; Martin *v.* Hunter's Lessee, 1 Wheat. 304, 335 ; U. S. *v.* Wiltberger, 5 Wheat. 76, 108, n.

[4] Corfield *v.* Coryell, 4 Wash. 371, 384 ; Com. *v.* Peters, 12 Metc. 387 ; Sherlock *v.* Alling, 93 U. S. 99, 104; Reynolds *v.* The Favorite, 10 Minn. 242 ; Bohannan *v.* Hammond, 42 Cal. 227.

[5] Com. *v.* Peters, 12 Metc. 387, 393; U. S. *v.* Bevans, 3 Wheat. 336, 386. But see Chase Adm. *v.* Steamboat Co., 9 R. I. 419.

[6] Lib. LXX. chap. 3.

[7] U. S. *v.* Bevans, 3 Wheat. 336; U. S. *v.* Grush, 5 Mason, 290.

tide waters? Clearly its jurisdiction extends over its "territorial limits," and these are now to be determined. As we have seen, the fisheries are controlled by the State as an incident of the ownership within these limits; they are equally, in this connection, the bounds of its general jurisdiction. What, therefore, is the territory under tide water of a maritime State of the Union? Apparently, within a certain maximum, it is precisely what the State elects to claim. The ownership of the sea bed of the open waters opposite its coasts on the part of the State is by virtue of its general ownership of all unappropriated property.[1] The land under the sea adjoining any maritime State of this Union belongs to no one.[2] The national government can exercise, indeed, certain rights of jurisdiction; but none of its powers are such as to conflict with a State's right to appropriate such portion of the sea bed adjoining its coast as it may think to be for the benefit of its citizens.[3] Usually, such land has no value. But should a State desire to reclaim a portion of the sea bed and make it part of its tillage land; should mines extend under the ocean in their workings; should it seem desirable to tunnel for any purpose for any distance under tide water, there seems no reasonable doubt that such appropriation would carry ownership of the land so taken.[4] Certainly such a claim on the part of the Legislature would be binding upon domestic tribunals, and it is not perceived how it would conflict with any federal power. Indeed, the possession of some maritime frontier in the shape of adjacent waters, even in the open sea, is necessary for the safety and dignity of every sovereign people.[5] It is conceived that the State is sovereign in this connection, and that the sea frontier of the nation is that of the several States.

If it be objected that, as States may vary in their claims of submarine territory, the general government would be placed in the anomalous position of representing, as to foreign nations, a country

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[1] Vattel, Bk. I. ch. 22, ss. 2, 66; Corfield *v.* Coryell, 4 Wash. 371, 386; Steam Engine Co. *v.* Steamship Co., 12 R. I. 348, 357; 2 Dane's Abr. ch. 68, art. 2; Atty.-Gen. *v.* Chambers, 4 De G., M. & G. 206.

[2] Inst. Lib. 2, tit. 1, §§ 1, 2, 5; Dig. Lib. 43, tit. 12-14; 2 Domat, Civil Law, Vol. I. tit. 8, § 1.

[3] Reg. *v.* Keyn, 13 Cox, Cr. Cases. 403, 514.

[4] Inst. II. 1, § 18; Dig. 41, 1, § 7; 1 Twiss, Bracton, 68; Howe *v.* Stowell, Alcock & Nap. 348, 358.

[5] Vattel, Droit des Gens, § 288 Manning, Law of Nations, 119.

with a frontier of different width, the answer would seem to be that such considerations cannot affect the question of the State or national jurisdiction over fisheries, and that Congress can readily avert any practical difficulties of the nature suggested, by simply enlarging its assumption of admiralty and maritime jurisdiction.

There is, as has been said, a limitation upon the just claim of a State to ownership in, or jurisdiction over, tide water. That limitation seems to consist in the power of effectual appropriation. *Jure gentium*, a State owns all the waters that it can control from the shore. In other words, its claim must be effectual, or potentially so. Any claim under this, by the sovereign, is unchallenged in any quarter.

The earlier claims of jurisdiction over tide waters were without this, or, indeed, any particular limitation. Selden, in his "*Mare Clausum*," [1] claimed for Great Britain control of the four seas surrounding England and around the islands to any extent to which her cannon could clear the seas. This carried ownership of the *fundus maris* to the king. The Court of King's Bench claimed jurisdiction of offences on the narrow seas.[2] Sir Matthew Hale claimed the narrow sea as "part of the waste and demesnes and dominions of the King of England." [3]

Sir Leoline Jenkins, in 1683, as Judge of Admiralty, *temp.* Charles II., claimed a protectorate of the whole world for England, admitting in certain waters a concurrent jurisdiction in the adjacent country.

The continental jurists who have handled the question vary between wide limits. Selden's claim of jurisdiction for England in surrounding waters has been followed by other writers, though the extent varies greatly.

Albericus Gentilis gives a jurisdiction to the State of one hundred miles; Casaregis,[4] as late as 1740, gives substantially the same limit. Baldus and Bodinus say sixty miles. Puffendorf cites this limit with approval. Loccenius [5] puts it at two day's sail. Valin allows the state [6] all the surrounding waters that can be fathomed

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[1] Lib. 1, ch. 26.

[2] 25 Edw. I. (A.D. 1297); Beufo *v.* Holtham, Selden's notes to Fortescue, c. 32; Norman Master, etc., Fitz. Ab., Corone, 216; 13 Co. 53; 2 Hale, P. C. 12, 13.

[3] Hargrave's Law Tracts, 10, 31, 32, 41, 43.

[4] Discursus de Commercio, sec. 136.

[5] De Jure Maritimo, ch. 4, sec. 6.

[6] Commentary on French Ordinances, ch. 5.

by a lead line. Lampredi, writing as late as 1778,[1] limits the state only by its necessity or its idea of its own convenience. Rayvenal[2] makes the horizon the limit.

It is obvious that these wide claims, however gratifying to the vanity of maritime countries, — especially England, — were unsatisfactory as a working theory, and some more definite rule was needed. This was furnished by Grotius, who states a principle of limitation, — the distance over which compulsion can be exercised from the land, — "*quâtenus ex terrâ cogi possunt.*"[3] Bynkershoek, in 1702, gives the same rule as Grotius, and suggests also the method of the compulsion, — the portage of cannon, — "*quousque tormenta exploduntur.*"[4] Ortolan[5] indorses Bynkershoek's rule, and gives the range of the "*tormenta*" as three miles, — "*Depuis l'invention des armes à feu cette distance a ordinairement été considérée comme de trois milles.*" Marten gives the three-mile limit as a minimum of the valid claim of the State to what Hautefeuille calls "territorial waters;"[6] Schultes,[7] Azuni,[8] Klüber,[9] Fiore,[10] adopt the three mile limit, as being the carriage of cannon.

The American text-writers are in accord.[11] The "marine league" has been accepted by eminent judges in both countries.[12] English text-writers, it may be observed, persistently have clung to the broad claim of the "*Mare Clausum.*" The "three-mile limit" was evolved by continental writers, to whom the motto "*potestas*

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[1] Public, Jur. Theor., Vol. II. p. 65.

[2] Institutions, L. 2, ch. 9, § 10.

[3] Lib. II. cap. 2, sec. 13.

[4] De Dominio Maris, 2, p. 257.

[5] De la Mer Territoriale, ch. viii.

[6] Des Droits et Devoirs des Nations Neutres.

[7] Ch. ii. p. 144.

[8] Droit Maritime, etc., Vol. I. p. 252, sec. 14.

[9] Droit des Gens, pt. II. tit.II. § 130.

[10] Vol. I. p. 370 (1865). See also Pando, Elem. del Der. Int. 155; Heineccius, lib. 2, c. 3, § 12; Ortolan, Diplom. de la Mer, Vol. I. bk. 2. c. 8; 1 Phill. Int. Law, c. 4, § 154; c. 8, § 196; Manning's Law of Nations, 118, 119; The Annapolis, Lush. Adm. 295; The Saxonia, 15 Moore, P. C. 262; Church *v.* Hubbard, 2 Cranch, 187; U. S. *v.* Smiley, 6 Saw. 640.

[11] Halleck, ch. vi. § 13; 1 Kent, Comm. 26-31; Bishop, Comm. Crim. Law, Bk. IV. chap. 5, § 74; Gould on Waters, §§ 13, 16; Wheat chap. 4, sec. 10; Story, Conf. Laws, sec. 529.

[12] Maria, 1 C. Rob. 352; Twee Gebroeders, 3 C. Rob. 162; The Leda, Swa. 40; Colliery Co. *v.* Schurmanns, J. & H. 180; Brig Ann, 1 Gall. 62.

finitur ubi finitur armorum vis" was a very acceptable solution of a vexed question.[1]

The nature and source of the State's right in the surrounding sea has also been much in controversy with the continental jurists. Wolff, in his "*Jus Gentium*:" published in 1749, speaks of the surrounding water as "territory:" "*Quoniam partes maris occupatæ* [the idea of appropriation] *ad territorium illius gentis pertinent qua eas occupavit quale jus Rector civitatis in suo territorio habet, tale etiam ipsi competit in partibus maris occupatis.*" Heubner, writing in 1759, calls this sea an "accessory;"[2] Puffendorf[3] uses the same phrase; Moser,[4] in 1778, says it is under the sovereignty of the adjacent land, so far as a cannon shot will reach. Ortolan speaks of the right as one of jurisdiction, "*Lois de police et de sûreté*," and not of ownership (*propriété*). Calvo[5] takes the same ground. The better doctrine seems, however, to be that of Vattel, — that the sovereign can take the sea bed as unappropriated land, — "*s'empare de certaines parties de la mer*,[6] *s'empare d'un pays qui n'appartient encore à personne;*"[7] and that this ownership carries jurisdiction with it, — "*l'empire aussi bien que le domaine.*"[8]

The question was discussed in many of its bearings in the celebrated case of *Regina* v. *Keyn*,[9] equally noted perhaps for the eminence of the counsel, the exhaustive learning of the judges, and the wide diversity of their opinions. The facts are familiar. February 17, 1876, a collision took place in the English Channel, off Dover, one mile and nine-tenths of a mile from Dover pier, and within two and a half miles from Dover Beach, between the English steamer "Strathclyde" and the German steamer "Franconia," both being engaged in friendly commercial voyages. A hole was pierced in the hull of the "Strathclyde," which soon sank, and many lives were lost. The "Franconia" made no attempt to render assistance, but steamed away without lowering its boats into

[1] See 1 Blackstone's Comm. 110; Chitty, Prerogative, 142, 173, 206; 1 Bacon, Abr. 640; Co. Litt. 107.

[2] De la Saisie des Bâtimens Neutres, ch. 1 §§ 128-132.

[3] De Jure Naturæ et Gentium, lib. IV. ch. 2, § 8.

[4] Versuch des Neuesten Europäischen Völkerrechts, vol. V. p. 486.

[5] Droit International, lib. V. §§ 199, 201.

[6] Bk. I. ch. 23, § 295.

[7] Bk. I. ch. 18, § 205.

[8] Bk. II. sec. 84.

[9] L. R. 2 Ex. D. 63; 13 Cox C. C. 403.

the water. The excuse of the German captain was that he supposed his own vessel to have been badly injured; and that the English pilot on board, who was not then in charge, but had been a short time before, having been sent to ascertain the extent of the damage, returned and cried out, "For God's sake! put the helm a-port, and run to the shore; I think our ship is going to sink too." Cross-actions of collision between the two vessels were tried about the 1st of May, 1876, in the admiralty division of the High Court of Justice, before Sir Robert Phillimore and two elder brethern of the Trinity House, by whom the "Franconia" was adjudged wholly to blame. An appeal to this judgment was dismissed by the admiralty judges. Meantime, Ferdinand Keyn, the German captain, was arrested at Dover for manslaughter by negligence. He was tried at Old Bailey in April, according to the course of the common law, in the Central Criminal Court, before Pollock, B., and a jury, and found guilty. The jurisdiction of the court was a question reserved to the Court for Crown Cases Reserved. The Central Criminal Court by statute [1] has power to hear and determine offences "committed on the high seas and other places within the jurisdiction of the admiralty of England." The leading counsel for the defendant was the celebrated and, in many respects, remarkable Judah P. Benjamin, Q.C. The case was twice argued. The Court for Crown Cases Reserved, by a bare majority (Cockburn, C. J., Kelly, C. B., Bramwell, J. A., Lush, J., Pollock, B., Field, J., and Sir R. Phillimore, seven judges), *held* that there was no jurisdiction in the English court to try the offence. A strong minority of six (Lord Coleridge, C. J., Brett, J. A., Amphlett, J. A., Grove, J., Denman, J., and Lindley, J.) dissented, on the ground that the offence, being committed within three miles of the English coast, was within the criminal jurisdiction of the English admiralty courts. All the judges agreed that county lines extended only to low-water mark. It was also agreed that if the offence had been murder, the offence, being committed on a British ship, would have been amenable to English law.[2] And all the judges conceded that had any statute extended the jurisdiction of the English courts of admiralty to the limit of three miles, such a statute would have been binding upon the courts of England, and authorized a conviction of the defendant.

[1] 4 & 5 Will. IV. c. 36.

[2] Rex. *v.* Coomes, 1 Leach C. C. 388.

This decision, the correctness of which has not been generally conceded,[1] resulted in the removal of any danger of a recurrence of the difficulty by the passing of an act of Parliament [2] which extended the jurisdiction of England to the limit of a marine league from low-water mark, carefully regulating the operation of the act in the interests of diplomacy.

Applying these rules to the case at bar, in the absence of any special statute, it would be doubtful whether the crime could be considered as committed *intra fauces terræ*. Under the old rules of the common law, waters *intra fauces terræ* were those lying inside headlands so close that objects could reasonably be discerned across by the naked eye.[3] Such lands were within the body of the county, and offences therein committed were cognizable by the courts of common law.[4] Apparently such a claim would be impossible in this case.[5] It is contended that the offence not being within the body of the county at common law, cannot be made within the county by any other authority. But the rule of the common law based itself simply upon the State's claim as it then was. What prevents the state from making other and larger claims within the limits of effectual appropriation? [6] But the fact itself is, however, less important in that the offence clearly was committed within a mile and a quarter of the shore; that is, within the three-mile limit, if this is to be considered the open sea. In Dunham *v.* Lamphere [7] the common-law rule, in Massachusetts, is stated as a marine league from shore, and from a line drawn between headlands "so narrow that objects can be distinguished across by the naked eye." [8]

In Chase, Adm's *v.* Steamboat Co.,[9] the court say that "before

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[1] See speech of Lord Cairns, reported Halleck, Int. Law (Baker's ed.), 559; Blackpool Pier *v.* Fylde, 46 L. J. M. 189.

[2] 41 & 42 Vict. c. 73.

[3] The Eleanor, 6 Rob. Adm. 39; The Public Opinion. 2 Hagg. Adm. 398; The Harriet, 1 Story, 251; U. S. *v.* New Bedford Bridge, 1 Wood & M. 401, 483; People *v.* Supervisors, 73 N. Y. 393, 396; Com. *v.* Peters, 12 Metc. 387; U. S. *v.* Grush, 5 Mason 290.

[4] The Fame, 3 Mass. 147; Cable Co. *v.* Telegraph Co., 2 App. Cases, 394, 419; Ins. Co. *v.* Dunham, 11 Wall. 17.

[5] But see Reg. *v.* Cunningham, Bell C. C. 86.

[6] Hall, Int. Law, 127; 1 Fiore, Int. Law, 373.

[7] 3 Gray, 268.

[8] Com. *v.* Peters, 12 Metc. 387.

[9] 9 R. I. 419; s. c. 16 Wall. 522.

the adoption of the Constitution the State had jurisdiction over the bay and over the coast of the sea to the extent of a marine league."

But the matter has been expressly settled by statute. On the adoption of General Statutes,[1] in 1860, the following statute was enacted: "The territorial limits of this Commonwealth extend one marine league from its seashore at low-water mark. When an inlet or an arm of the sea does not exceed two marine leagues in width between its headlands, a straight line from one headland to the other is equivalent to the shore line." This statute was reënacted in 1882, in Public Stats., chap. 1, sec. 1.[2]

Whether the necessity for making this claim arose from certain difficulties by which the court were oppressed in deciding the case of Com. *v.* Peters,[3] though they express none, or was suggested, as stated by Dwight Foster, Esq.,[4] by the *Nisi Prius* ruling of Allen, J., in Barnstable County, in November, 1859, where an indictment was tried for kidnapping a fugitive slave transferred from a Pensacola brig, in which he was concealed, to another to take him back to Florida, off Hyannis, below low-water mark, but less than three miles from shore, is not perhaps of consequence. As Com. *v.* Peters was decided in 1847, it could hardly have been the immediate cause of a statute passed twelve years later. It suffices, however, for the present purpose, that the State has advanced this claim. Such a claim is binding upon the domestic tribunal, and opposed, it is believed, to no law, national or international. Were the claim much more extravagant, still, as said by Cockburn, C. J., in Reg. *v.* Keyn,[5] "That such legislation, whether consistent with the general law of nations or not, would be binding on the tribunals of this country, leaving the question of its consistency with international law to be determined between the governments of the respective nations, can, of course, admit of no doubt."

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[1] Chap. 1 sect. 1.

[2] See Gen. Stats. R. I. c. 1. sects. 1 and 2; Const. California, art. 12; Mahler *v.* Transportation Co., 35 N. Y. 352, 360; Const. Alabama, art. 2, sect. 1; Galveston *v.* Menard, 23 Tex. 349; The Peterhoff, 5 Wall. 28, 51.

[3] 12 Metc. 387.

[4] 11 Am. Law. Rev. 625.

[5] 13 Cox, Cr. C. 403. See also remarks of Coleridge, C. J., at p. 480. See also Butler *v.* Steamship Co., 130 U. S. 527; Heffter, Pub. Int. Law, § 75; Bluntschli, Das Moderne Volkerrecht, §§ 307, 309.

Exactly what was deemed necessary in the case of Regina *v.* Keyn has been done by Massachusetts to vest a jurisdiction in her State courts to try an offence against her laws committed on open tide waters within her territorial limits. It would seem as if the result would follow that inside these limits she can protect her fisheries against all intruders.

Charles F. Chamberlayne.

BOSTON, March 4, 1890.